IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1571

HAROLD PETER ENTRINGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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GROUNDS ON WHICH JURISDICTION IS INVOKED

Jurisdiction is invoked in this matter by reason of Rule 19 (1), (b), Title 28, Supreme Court Rules for the reason that the Eighth Circuit Court of Appeals of the United States has rendered a decision herein which is in conflict with a decision of the same Circuit in the matter of *United States of America v. Thomas Charles Kelly*, — F. 2d — (8th Cir. January 1976) said decisions being in direct conflict on the same matter and

which case was described by the Government's Attorney as "totally analogous" in his oral argument before the Court in the *Entringer* case. Therefore there exists presently a conflict within the same Circuit, on the same subject matter, relative to the law as it pertains to 18 U.S.C. § 1462 (1970).

Your Petitioner further states that in the immediate case the judgment seeking to be reviewed was filed and entered on March 12, 1976. Further on April 1, 1976 the United States Court of Appeals for the Eighth Circuit pursuant to a *Petition of Appellant for Rehearing* denied said Petition.

STATUTORY PROVISION CONFERRING JURISDICTION TO REVIEW JUDGMENT BY WRIT OF CERTIORARI

The Appellant contends that this Court has jurisdiction to review the judgment by reason of 18 U.S.C. § 3772 which reads as follows:

> "The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, in the United States court of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.
>
> The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein

> authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.
>
> The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.
>
> Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.
>
> As amended May 24, 1949, c. 139, § 60, 63 Stat. 98; July 7, 1958, Pub. L. 85-508, § 12 (1), 72 Stat. 348; Mar. 18, 1959, Pub. L. 86-3, § 14 (h), 73 Stat. 11."

QUESTIONS PRESENTED FOR REVIEW

1) Was the search and seizure of the films in the immediate case violative of the rights of the Appellant under the Fourth Amendment to the Constitution of the United States?

2) Was the search of the packages in the immediate case a non-governmental search instituted and conducted solely by the common carrier, TWA, and therefore a private search which was not violative of the rights of the defendant pursuant to the Fourth Amendment to the Constitution of the United States?

3) Were the rights of the Appellant violated by the failure of the Federal Bureau of Investigation and its agents in failing to go before a Magistrate and make application for a warrant of search and seizure for the packages concerned herein, and their actions therefore violative of the Appellant's rights pursuant to the Fourth Amendment to the Constitution of the United States of America?

APPLICABLE STATUTES

The applicable statute involved in this case is to be found in 18 U.S.C. § 1462 and is the Statute under which Indictment was brought in this case said Statute reading as follows:

> "§ 1462. IMPORTATION OR TRANSPORTATION OF OBSCENE MATTER. Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or
>
> (b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or
>
> (c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.
>
> As amended Jan. 8, 1971, Pub. L 91-662, § 4, 84 Stat. 1973."

STATEMENT OF THE CASE

The evidence adduced in this matter was two fold in nature consisting of certain stipulated and agreed facts by and between the parties and evidence adduced from the witness stand.

The parties have stipulated that one Sue Cox an employee of the Emery Air Freight would testify that on the 8th day of May, 1974 at about 2:00 p.m. the defendant presented himself at her office and inquired as to whether or not his shipment was in from Philadelphia. The witness Cox advised defendant at that time that his shipment had been pilfered and was presently being held by the Federal Bureau of Investigation. At that time the defendant left. The defendant had been a frequent customer of Emery Air Freight for approximately two (2) years prior to May 8, 1974 and had on numerous occasions reshipped packages to Guam after declaring to the Federal Authorities that said packages contained films. (STP. 1)

James Matthews was also an employee of Emery Air Freight serving in the capacity of service manager for approximately eight (8) years. He also knew the defendant herein. On the earlier afternoon of May 8, 1974 he received a call from Trans World Airlines concerning a two (2) piece shipment from the Stardust Enterprises of Philadelphia, Pennsylvania, forwarded by Emery Air Freight via Trans World Airlines. Matthews would have testified that the shipment was addressed to the defendant herein at 616 Meramec Station Road, Manchester, Missouri and that the defendant presented himself to Cox and inquired of the shipment. Matthews would also have been able to identify the originals of the air bill and the bill of lading of this shipment which was later identified as Government's Exhibit 7. (STP. 2)

Jim Stinson would testify that on May 8, 1974 one piece of a two piece shipment sent by Stardust Enterprises, 605 North

American, Philadelphia, Pennsylvania, to the defendant at Risque Farms, 616 Meramec Station Road, Manchester, Missouri and shipped by Trans World Airlines had arrived in St. Louis in a broken condition. In order to determine if any of the shipment was missing Stinson opened the second package and determined that the two packages should have contained 114 films of a 124 film shipment. The invoice inside the second package, Government's Exhibit 5, and the invoice therein being Government's Exhibit 5a, indicated that 124 films were forwarded by Emery Air Freight and the goods shipped therein were noted "leather novelties." Stinson would have testified that the opening of the packages was done pursuant to a policy of Trans World Airlines regarding damaged or pilfered shipments. (STP. 3)

James Eberhardt was the manager of the cargo service section of Trans World Airlines on May 8, 1974. He would have testified that after the shipment of films was observed to have been pilfered he notified the Federal Bureau of Investigation concerning the investigation of a possible theft from an interstate shipment. He would also testify that it was a policy of Trans World Airlines to inventory any shipment which is found to be damaged or pilfered in order to determine how much of the shipment had been either damaged or stolen. He would also have testified that he was present during the inventory of the shipment along with Special Agent Leon Cantin of the Federal Bureau of Investigation, Mr. Jim Stinson, of Trans World Airlines and Mr. Jack Zdvorak, a Supervisor of Trans World Airlines. (STP. 4)

It was also stipulated that the records of Bell Telephone Company of Pennsylvania would indicate that telephone number 215-922-0907 was installed on January 17, 1974 at Stardust Enterprises, 605 North American Street, Philadelphia, Pennsylvania, and was in operation at that address through June of 1974.

A representative of Southwestern Bell Telephone Company of St. Louis would also testify that number 314-392-1192 had been installed at 616 Meramec Station Road, Ballwin, Missouri, in the name of Harold Peter Entringer at all times relevant to the issues involved in this Indictment. The representative of Southwestern Bell Telephone Company would testify that on May 8, 1974 a call was made from the St. Louis number to the Philadelphia number that lasted five (5) minutes and also that on May 9, 1974, April 16, 1974, April 18, 1974, May 2, 1974, May 28, 1974, May 31, 1974 and July 4, 1974 similar calls were made from said number to the number in Philadelphia. (STP. 5)

It was further stipulated that Perry Blunda was the owner of the P & B One Stop Records and that he knew the defendant as a customer for many years. He would further testify that on April 9, 1975 the defendant called him and told him that he was expecting to receive a package from United Parcel Service and it would be a C.O.D. shipment. The defendant further instructed the witness not to accept the package and that he, the defendant, did not want the shipment. The witness further testified that the defendant informed the witness to tell United Parcel Service to send the shipment back to California. (STP. 6)

Richard Umfleet was a driver for United Parcel Service who on April 9, 1975 took a package to 1911 Washington Avenue in the City of St. Louis, State of Missouri being the premises where the P & B One Stop Records Shop was located. He would testify that one Perry Blunda told him that he did not care to receive the package. Umfleet would also testify that he knew the defendant and had seen him at the record shop on several occasions. (STP. 7)

David Stout would have testified that he lives at 614 Meramec Station Road, St. Louis, Missouri which is next to 616 Meramec

Station Road, the home of the defendant. He would testify that the defendant is a bachelor, lives alone and that he has on prior occasions accepted packages from United Parcel Service for the defendant the last of which was received on either April 1st or 2nd 1974 and that they were usually the same size, being approximately one foot, by two feet, and approximately six-eighth (6/8th) inches (high).

It is noted that all stipulations were received with the right to object to any matters contained therein and subject to all pre-trial motions filed.

The matter came before the Court for trial by the Court with jury waived on June 30, 1975 and the Government called as its first witness one Leon Cantin Special Agent of the Federal Bureau of Investigation who as of May 8, 1974 had been assigned to the St. Louis Office working as a resident agent at Lambert Field. On May 8, 1974 he had received a call from Trans World Airlines notifying him that a shipment had been pilfered. (TR-5) The following day May 9, 1974 he initiated his investigation. He identified Government's Exhibit 4 as being the pilfered carton which he first saw in the office of Mr. Eberhardt the Manager of Cargo Services for Trans World Airlines at Lambert Field in St. Louis, Missouri. He stated that the box was opened and that he had been present when the inventory was made although he did not personally open the box and conduct the inventory. He also identified Government's Exhibit 5 and said that when he first saw the Government's Exhibit 5 it was sealed and appeared to be in its original shipping condition. (TR-8) Subsequently Government's Exhibit 5 was opened by Mr. Zdvorak and the contents were examined. There was found therein a number of films of the eight millimeter variety with the notation thereon "not to be sold to minors." Government's Exhibit 4 was found to contain 94 films and Government's Exhibit 5 was found to contain 20 films. Canton testified that Government's Exhibit 5 was not opened at his request. (TR-10).

There had been found in Government's Exhibit 5 Government's Exhibit 5a which was a packing slip that had been discovered by either Zdvorak or Stinson after the investigation at the airport. All of the films were confiscated and seized by agent Stinson and returned to the Office of the Federal Bureau of Investigation. On cross-examination Special Agent Stinson indicated that at the time that Government's Exhibit 5 was opened no one had a warrant for the search of said package and that no warrant was applied for.

Subject to the Court's interrogation Special Agent Stinson indicated that although he was first notified of the broken package on May 8, 1974 he did not get around to the investigation of said incident until May 9, 1974 because he had been working on another matter and had merely requested that the materials be isolated in Eberhardt's office until he could get around to the investigation of the matter.

On May 14, 1975, in the chambers of the Honorable Kenneth Wangelin, United States District Judge, Government's Exhibits 1, 2 and 3 were viewed by the Court. Government's Exhibits 1 and 2 came from either Government's Exhibits 4 or 5 but it was unable to be determined exactly which Exhibit they came from. Government's Exhibit 3 had been seized at a later date pursuant to a search warrant issued and executed on April 23, 1975, some 11 months later. (TR-16)

On recross-examination Special Agent Cantin testified that he had no prior knowledge that the packing slip would be in Government's Exhibit 5 and it was merely an assumption on his part without any hard knowledge to the fact that said Exhibit could be found therein. Agent Cantin did acknowledge that prior to having Stinson and Zdvorak open Government's Exhibit 5 he failed to inform them that a warrant could be applied for in order to open said package. (TR-19) It was found that Government's Exhibits 4 and 5 inventoried out at

114 packages of film when they should have contained 124 packages. (TR-21)

The tear on Government's Exhibit 4 was approximately a 2½ to 3 inch tear on the long side of the box extending about 6 inches on the short side of the box. The lid of the box was still firmly attached on the inside but the other 3 sides had been completely cut open. However, at the time of the original discovery of the pilfering or the damage just the one corner of the box was torn. (TR-21-22)

The next witness called by the Government was Thomas T. Kubic, a Special Agent of the Federal Bureau of Investigation. He said that he had known the defendant and made an in Court identification of him. He further testified that he arrested the defendant on April 7, 1975 at 616 Meramec Station Road, St. Louis, Missouri. (TR-25) He also testified that on April 23, 1975 he was at the United Parcel Office in St. Louis where he served a search warrant for a box which was identified and marked as Government's Exhibit 9. He had first seen that box on April 22, 1975 in the unclaimed baggage or package area of the United Parcel Office. The package was from CID Corporation and sent to the defendant at Risque Farms. Special Agent Kubic also identified Government Exhibit 9a which was a photograph of Government's Exhibit 9 taken prior to the execution of the search warrant. Special Agent Kubic indicated that he had opened Government's Exhibit 9 and inventoried its contents and found it to contain eighty-four (84) eight (8) milimeter 200 foot reels of film. He also indicated that Government's Exhibit 3 came from Government's Exhibit 9. (TR-30)

On cross-examination Special Agent Kubic could not state whether or not Government's Exhibits 1 and 2 had been removed from either Government Exhibit 4 or 5. He indicated that there was a possibility that both Government's Exhibits 1 and 2 had been removed from Government's 5. (TR-32)

Agent Kubic indicated that during the course of the investigation of this defendant he had interviewed a gentleman by the name of Stout who was a neighbor of the defendant and who had indicated that as recently as March 1975 various packages had been left for the defendant at the Meramec Station Road address. He also indicated that his investigation had turned up the fact that the Federal Bureau of Investigation in Los Angeles pursuant to the execution of a search warrant on April 1, 1975 at the CID Corporation in Los Angeles, California had turned up various types and sets of films. This information had been obtained by Agent Kubic from an Agent Storiker of the Los Angeles Federal Bureau of Investigation on the 22nd day of April, 1975. This conversation did not involve the name of the defendant herein. (TR-37) Agent Kubic testified that the entire scope of his probable cause for the acquisition and execution of the warrant and search and seizure on April 23, 1975 was the fact that the package shipped by CID to the defendant was refused on April 9, 1975. (TR-30-40)

All Exhibits were admitted over the objection of the defendant and all grounds previously set out in the Motion to Suppress Government's Exhibits 1, 2, 3, 4, 5 and 9 were preserved.

A review is requested herein of a judgment of a Federal Court and the basis for federal jurisdiction in the Court of first instance is by reason of the fact that the defendant Harold Peter Entringer was indicted by a Federal Grand Jury in the Eastern District of Missouri, Eastern Division, on the 3rd day of April, 1975 for a violation of §1462, Title 18, United States Code.

ARGUMENT RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

The Appellant herein Harold Peter Entringer requests that this Court grant Certiorari in this matter.

It has readily been admitted by the Government's Attorney that the factual matters herein are completely analogous to those found in *United States v. Kelly*, — F. 2d —, No. 75-1686 (8th Cir. January 27, 1976), Appendix "B". Both defendants were charged with a violation of the same Statute, that Statute being 18 U.S.C. § 1462 (1973). A reading of the two (2) decisions will indicate that the only factual difference in the cases is that *Kelly supra* involved magazines whereas *Entringer* involved the transportation of movie films.

The *Kelly* decision *supra* was reversed by the Eighth Circuit of the United States Court of Appeals and at page 7 of said decision is found the following:

> "The government contends that appellant had no legitimate expectation of privacy since the packages were mailed C.O.D. to Century News [and because a common carrier has a right to inspect packages.] (Emphasis added) The government emphasizes that Kelly did not come into possession and had no right to possession until he had paid for the shipments. The contentions of the government, however, are too firmly tied to concepts of traditional property law, and a defendant's expectation of privacy should not be deemed unreasonable merely because he had not yet paid postage [nor because of a right of the UPS to inspect packages.] (Emphasis added)."

In the immediate case before us at page five (5) the Court bases its decision on the fact that the Fourth Amendment is not applicable to the situation at hand by reason of the fact that the

search as conducted was not a governmental search but was a search conducted by the common carrier pursuant to the carrier's own policy citing *United States v. Pryba*, 502 F. 2d 391, 398 (D.C. Cir. 1974), cert. denied 95 S. Ct. 815 (1975); *United States v. Echols*, 477 F. 2d 37, 39 (8th Cir.), *cert. denied* 414 U.S. 825 (1973).

The cases immediately heretofore cited pertain to the safety of passengers and property and it is admitted that a common carrier does have the right to conduct searches under certain circumstances where a possibility exists to either persons or property from the possibility that some harmful object may be contained in the objects searched. However, in the immediate case the search was conducted in a manner and in a way where it was positively apparent to all concerned that there was no danger to either persons or property. The "security profile" was not present. The search herein was conducted with full knowledge that the packages contained films and films only. The action of Special Agent Stinson of the Federal Bureau of Investigation in delaying the search for a period of one (1) day from May 8, 1974 to May 9, 1974 is an indication of the fact that the search was not one that need be conducted immediately for the safety of persons or property and it is further indicative of the fact that said search was not conducted as a result of TWA policy to determine loss. A loss inventory search would not require the presence of an Agent of the Federal Bureau of Investigation.

Further it is to be noted that a consignment of materials to a common carrier does not constitute an abandonment of the person's interests and the contents of the package. *Corngold v. United States*, 367 F. 2d 1, 6-7 (9th Cir. 1966). Therefore the Appellant's rights relative to the Fourth Amendment of the Constitution of the United States were violated by this search without a warrant.

At page six (6) of the Entringer decision the Court concerns itself with the possible exigent circumstance that the evidence could have been destroyed or have been removed so that a warrant, if applied for, would have been useless. The facts show that when the Appellant presented himself to the Emery Air Freight on the 8th day of May, 1974 he was told by Sue Cox, an employee of Emery Air Freight that said shipment was being held by the Federal Bureau of Investigation. (STP 1 Appendix "C") Subsequent to being so informed Entringer left the premises so that he was neither in close physical proximity to said items nor did he have any access to them because of the fact that they were then and there in the custody of the Federal Bureau of Investigation. Stipulation Number One (1) (Appendix "C") shows in and of itself that the search herein was one conducted by the Federal Bureau of Investigation through its agent Stinson on the 9th day of May, 1974.

The Government contends that certain pamphlets contained in and associated with Exhibit Number Four (4) were in plain view and might possibly give rise to a search pursuant to and in accord with the Fourth Amendment to the Constitution of the United States. It is contended by the Appellant that the Fourth Amendment should be read in conjunction with the First Amendment rather than "in a vacuum." In *Kelly supra* at page 12 is found the following:

> "In the absence of exigent circumstances, therefore, seizure of First Amendment materials should observe traditional constitutional safeguards and allow a Judge to focus searchingly on the question of obscenity."

The search and seizure of Exhibits Four (4) and Five (5) in the immediate case was in violation of the rights of the Appellant pursuant to the Fourth Amendment because said search was conducted without a prior judicial evaluation. The Federal Bureau of Investigation had more than ample opportunity to obtain a valid warrant for the search of these matters.

It would appear that though the factual situation of *Kelly* and *Entringer* are admittedly analogous, contrary decisions relative to analogous issues have been reached by the same Court.

Wherefore, Appellant prays that the Supreme Court of the United States grant his Petition for Writ of Certiorari filed herein and review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 75-1767

United States of America, Appellee,

v.

Harold Peter Entringer, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: February 9, 1976.
Filed: March 12, 1976.

Before GIBSON, Chief Judge; BRIGHT, Circuit Judge; and VAN PELT, Senior District Judge.*

BRIGHT, Circuit Judge.

Harold Peter Entringer appeals his conviction of one count of using a common carrier to transport obscene material in violation of 18 U.S.C. § 1462. We affirm.

---

* ROBERT VAN PELT, Senior District Judge, District of Nebraska, sitting by designation.

Most of the facts were stipulated at trial and the rest are not seriously disputed.

On May 8, 1974, a two-package c.o.d. shipment addressed to appellant-Entringer at his residence, Risque Farms, Manchester, Missouri, arrived at the Trans World Airlines offices in St. Louis, Missouri. The shipment was being carried by TWA for Emery Air Freight. Emery is an air freight forwarder and uses commercial airlines to transport its shipments. One of the two packages had been opened and apparently pilfered.

Upon observing the apparent pilferage, TWA employees isolated the packages and in the early afternoon of May 8, called an FBI agent, Leon Canton, to report a possible theft from an interstate shipment. The TWA employees indicated that company policy required them to inventory the shipment to determine the extent of any loss. Because Canton was involved in another investigation, he asked TWA to wait until the following morning so that he could be present during the inventory. TWA also notified Emery that delivery of the packages would be delayed pending further investigation.

On the afternoon of May 8th, after the shipment had arrived, appellant-Entringer attempted to pick it up at the Emery Air Freight offices to which TWA would normally have forwarded the shipment. He was informed there had been possible pilferage and the packages were being held pending an FBI investigation.

On the morning of May 9th, agent-Canton arrived at the TWA offices. The TWA employees then proceeded to inventory the two packages. Since the invoice was contained in a second unopened package, it was necessary to open both packages in order to obtain a complete inventory. The invoice indicated that the packages should have contained 124 items. Although the invoice listed the items shipped as "leather novelties," they

were, in fact, reels of 8mm films. Only 114 reels were contained in the two packages. The films were marked "not to be sold to minors." Packed with the films were advertising pamphlets and brochures which graphically illustrated the film's contents. Appellant does not deny that the films and pamphlets were legally obscene.

After viewing this material, agent-Canton seized it and brought the material to the FBI offices. As a result of this seizure, an investigation was launched into the use of common carriers for importation of obscene material into the St. Louis area.

On April 7, 1975, a United States Grand Jury returned the indictment in the present case. That same day FBI agent Thomas Kubic arrested appellant-Entringer. Evidently as a result of alarm generated by this arrest, Entringer contacted the P & B One Stop Records Shop. He told the manager whom he had known for years that he was expecting a c.o.d. shipment from the United Parcel Service. Entringer instructed the manager to refuse delivery and to inform United Parcel Service that the shipment should be returned to California. When United Parcel attempted delivery, the manager did as Entringer had requested.

The shipment therefore was returned to the United Parcel Service unclaimed package area. There it was observed by agent-Kubic. He photographed the package. On the basis of the photograph and the seizure of the previous shipment to appellant 11 months earlier, together with other information, Kubic obtained a search warrant and seized the package.

Entringer asserts the following three grounds for reversal:

1) The district court abused its discretion by refusing to dismiss the indictment for failure of the grand jury to actually view the obscene films.

2) The obscene material was seized without a warrant in violation of the fourth amendment.

3) Additional obscene material used as evidence of appellant's knowledge and intent was illegally seized pursuant to an invalid warrant.

Appellant's challenge to the indictment is without merit. The trial record indicates that the Grand Jury did view the advertising pamphlets and brochures which accompanied the films. It is undenied that these were obscene. In addition, the Grand Jury received the detailed testimony of special agent Allen Rogers describing the contents of the film. On the basis of the pamphlets and brochures and this testimony, the Grand Jury declined to view the films which were available to them. Agent-Rogers' testimony was not hearsay as appellant claims. Although not the "best evidence," his testimony was nonetheless direct evidence of the contents of the films. Even if it were hearsay, it would be adequate to support this indictment. *United States v. Akin*, 464 F.2d 7 (8th Cir.), *cert. denied*, 409 U.S. 981 (1972); *see also Costello v. United States*, 350 U.S. 359 (1956).[1]

The second issue raised by appellant is more difficult. The facts are very close to those in *United States v. Kelly*, — F.2d —, No. 75-1686 (8th Cir., Jan. 27, 1976). There, even though the appellant conceded that the search was conducted by a private party and therefore did not violate the fourth amendment, the court held it to be error for the FBI to seize allegedly obscene material without first obtaining a warrant.

Here, appellant has not conceded that the search was private. The facts, however, establish the contrary. The uncontradicted

[1] Appellant probably waived his objection to the indictment by failng to make an adequate record at trial. Nothing in the trial record indicates that the Grand Jury failed to view the films. However, on appeal, the United States without objection from defendant, has submitted the affidavit of special agent-Rogers setting out the facts recited above. This affidavit was accompanied by a motion to waive Federal Rule of Criminal Procedure 6(e). Appellant has not opposed our reception of this affidavit, and both parties referred to the contents of the affidavit at oral argument.

evidence is that TWA pursues the policy of taking inventory of apparently pilfered shipments in order to determine the extent of any loss. The search did not lose its private character because TWA chose to wait a reasonable time for the presence of an FBI agent before making the inventory. The agent's presence was desirable both to assure accuracy of the inventory and to assist in preventing the destruction of any evidence of the theft which might have been discovered during the course of the private inventory. The fourth amendment does not require the FBI to obtain a warrant before entering the premises of a common carrier with the carrier's consent to observe an inventory conducted because of the carrier's own policies. *See United States v. Pryba*, 502 F.2d 391, 398 (D.C. Cir. 1974); *United States v. Echols*, 477 F.2d 37, 39 (8th Cir.), *cert. denied*, 414 U.S. 825 (1973). Under the circumstances, we hold the search was private and thus did not violate appellant's fourth amendment rights. As in *Kelly*, the lawfulness of the warrantless seizure remains as the crucial issue.

In *Kelly*, the court expressly found that no exigent circumstances justified the seizure. — F.2d at — (slip op. at 10). The obscene material there was consigned to an established newsstand where it was to be incorporated into inventory. The recipient of the material was unaware of the FBI's interest in the shipments and was therefore unlikely to destroy or hide the material. Indeed, he felt so secure that he periodically submitted claims to the shipper for shortages caused by the FBI's seizures of samples from various shipments.

By contrast, here a genuine danger existed that the evidence would be destroyed. The recipient, Entringer, did not generally incorporate the shipments which he received into the stock of an established business. Instead, according to appellant's statement of the facts, he had "on numerous occasions reshipped [such] packages to Guam * * *." Further, on May 8th, prior to the time that the FBI had any idea that the contents of the ship-

ment might be obscene, appellant had attempted to obtain delivery but was informed that the packages were being held until the apparent cargo theft could be investigated. Had agent-Canton not seized the films at the time of the inventory the evidence would likely be lost through delivery to Entringer. These exigent circumstances justified a warrantless seizure of the films. *See Roaden v. Kentucky*, 413 U.S. 496, 505 n.6 (1973).

Appellant's third contention, attacking the warrant issued for a second shipment 11 months later lacks substantial merit. The contents had been shipped to appellant c.o.d. Whatever interest he may have had in that shipment prior to delivery terminated when, at his instructions, delivery was refused and United Parcel Service was instructed to return the product to the sender. It is clear that as of that time appellant abandoned any privacy interests which he might have had in the contents of the package. The Supreme Court has been emphatic that

> [t]he established principle is that suppression of the product of a fourth amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. [*Allderman v. United States*, 394 U.S. 165, 171-72, 188 n.1 (1969).]

See Brown v. United States, 411 U.S. 223, 229 (1973). Therefore, he lacks standing to challenge the Government's search and seizure regardless of its legality.

Accordingly, we affirm appellant-Entringer's conviction.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 75-1686

United States of America, Appellee, v. Thomas Charles Kelly, Appellant.	Appeal from the United State District Court for the Eastern District of Missouri.

Submitted: December 11, 1975
Filed: Janury 27, 1976

Before Ross, Stephenson and Webster, Circuit Judges.

Stephenson, Circuit Judge.

This appeal requires review of appellant's conviction of interstate transportation of obscene matter.[1] Following indict-

[1] The statute, 18 U.S.C. § 1462 (1970), in relevant part proscribes the knowing use of a common carrier for carriage of any obscene material in interstate commerce and the knowing receipt from a common carrier of any obscene material so transported.

ment and a non-jury trial resulting in a finding of guilt, the district court[2] imposed a six-month sentence of imprisonment and levied a $3,500.00 fine. The principal issues arising in this appeal relate to appellant's standing to contest the legality of governmental seizure of allegedly obscene matter[3] and the propriety of the seizure itself. Our review of the record and the controlling legal precedent reveals that the district court erroneously admitted into evidence various books and magazines seized by the government in violation of the Fourth Amendment. We accordingly reverse.

I

A threshold issue to be resolved is whether the appellant has standing to contest the alleged seizure of books and magazines which served as the evidential basis for his conviction. Appellant Thomas C. Kelly is the sole proprietor of Century News Company, an adult bookstore located in St. Louis, Missouri. For approximately seven years Century News transacted business with Sovereign News Company, a Cleveland, Ohio, corporation engaged in the business of distributing adult books and magazines. Century News was on an automatic distribution or standing order list at Sovereign News and received new publications on a weekly basis. During 1973 Sovereign News shipped large quantities of adult books and magazines to Century News C.O.D. by United Parcel Service (UPS), a common carrier authorized by tariff or certificate to transport goods from Ohio to Missouri.

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[2] The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri.

[3] Appellant does not raise any issue on appeal with respect to the district court's finding that the material is obscene. *See Miller v. California*, 413 U.S. 15, 24-26 (1973). With obscenity not at issue, further description of the materials is unnecessary.

On June 18, 1973, Gerald Spitznagel, loss prevention manager for UPS, became aware that a carton of goods shipped by Sovereign News to Century News was ripped open. In order to determine the extent of damage or loss, Mr. Spitznagel removed the contents of the carton, which he observed to be books and magazines bearing titles suggesting they depicted explicit sexual activity. Subsequently, he placed the magazines on his desk and proceeded to telephone William McDermott, a special agent for the FBI. Agent McDermott arrived, examined several of the magazines and took seven of them. He gave Mr. Spitznagel a receipt for those he retained. The carton was then rewrapped and ultimately picked up by Century News. Appellant later wrote a letter to Sovereign News requesting credit for the shortage created by the same magazines seized by the government and eventually received a credit memo for the shortages.

On six other dates throughout July and August of 1973, Mr. Spitznagel notified Agent McDermott of other damaged shipments of similar kind which were also shipped by Sovereign News and consigned to Century News. Specifically, on June 22, July 5, July 16, July 20 and August 28 Mr. Spitznagel noticed cartons, shipped by Sovereign News to Century News, which were ripped open in the UPS terminal. On each occasions, he took the cartons to his office, placed them on his desk and called Agent McDermott, who then seized samples of books or magazines from each shipment. Agent McDermott tendered receipts to UPS for the books and magazines retained. No warrant was ever obtained prior to the seizure of the materials. Without exception, the remainder of each carton was rewrapped and subsequently picked up by Century News. The United Parcel Service received payment for each shipment from Century News. On one other occasion, July 25, 1973, when a similar carton was discovered FBI agents proceeded to examine the books and magazines and mark them for identification. All of the materials in that particular shipment were replaced, and

the carton was rewrapped. Agent McDermott eventually purchased from Century News some of the books which had been marked. Indictment followed, charging appellant in seven counts with the violation of 18 U.S.C. § 1462 (1970), using a common carrier for interstate transportation of obscene matter.

Prior to trial, appellant filed a motion to supress the admission of the books and magazines into evidence. By agreement of counsel, the motion to suppress evidence and an additional motion to dismiss the indictments were taken with the trial on the merits and were submitted on the evidence adduced at the trial. At the trial the books and magazines were introduced by the government, over appellant's objection, into evidence and obviously served as a critical basis for appellant's conviction.

Appellant contends that the trial court erred when it denied his motion to suppress the books and magazines since they were allegedly the result of illegal search and seizure. The government, however, asserts that Kelly has no standing to contest the search and seizure. Specifically, the government emphasizes that Kelly was not on the UPS premises at the time of the seizures, he was not charged with an offense that includes possession of the seized evidence as an element of the charged crime, and he alleged no proprietary or possessory interest in the premises. *See Brown v. United States*, 411 U.S. 223, 229 (1973); *United States v. Groner*, 494 F.2d 499, 501 (5th Cir. 1974).

The requirement of standing in the context of the Fourth Amendment turns on whether the defendant was a victim of the search or seizure or the "one against whom the search [or seizure] was directed." *Jones v. United States*, 362 U.S. 257, 261 (1960). Generally. a defendant has a sufficient interest to constitute standing if he has an adequate possessory or proprietary interest in the place or object searched. *United States v. Hunt*, 505 F.2d 931, 938 (5th Cir. 1974); *United States v. Banks*, 465 F.2d 1235, 1240 (5th Cir.), *cert. denied*, 409 U.S.

1062 (1972). But, a reasonable expectation of privacy in the enjoyment of a place or object may attach even when there is little or no proprietary interest. *See Mancusi v. DeForte*, 392 U.S. 364, 368 (1968); *Jones v. United States, supra*, 362 U.S. at 267. For example, in *Katz v. United States*, 389 U.S. 347, 352 (1967), the Supreme Court held that an individual has a significant privacy interest in insulating his own telephone conversations from electronic monitoring, even when he makes his calls from a public telephone booth. Clearly, "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Warden v. Hayden*, 387 U.S. 294, 304 (1967). At the same time, a person's protectable interest in his private property may often invoke a valid claim of privacy.

In any event, the major theme of the Fourth Amendment is the right to privacy. A person may have a reasonable expectation of privacy in the absence of a tradional property right. Correspondingly, a bare assertion of a property interest, without a supporting expectation of privacy, will not give rise to a cognizable Fourth Amendment claim. *See generally Alderman v. United States*, 394 U.S. 165, 171-180 (1969).

Logically, a person's protectable expectation of privacy must extend both to places and objects. A contrary conclusion would emasculate the plain language of the Fourth Amendment, which protects "papers" and "effects." *See United States v. Hunt*, 505 F.2d 931, 939 (5th Cir. 1974). *But see United States v. Groner*, 494 F.2d 499, 501 (5th Cir. 1974). The Supreme Court's most recent statement of the law of standing, despite some restrictive language, does not remove Fourth Amendment protection from objects seized. *See Brown v. United States*, 411 U.S. 223, 229 (1973). This conclusion is an inescapable implication from the Court's observation in Brown that the defendants "failed to allege any legitimate interest of any kind in the premises searched or the *merchandise seized*." *Id.* (emphasis added.)

In the instant case, it is clear that Thomas Kelly was the sole victim of the government's investigation and the one against whom the search or seizure was directed. *See Jones v. United States, supra,* 362 U.S. at 261. The packages from which the books and magazines were taken were addressed to Century News. Appellant Kelly is the sole owner of Century News. Mr. Barry Short, Assistant United States Attorney, testified that he regarded Kelly and Century News to be "one and the same." The appellant's handwriting was positively identified with that appearing on Century News' letters requesting book shortage credit from Sovereign News. No other individuals, including employees of Sovereign News, the shipper and distributor of the materials, were prosecuted.

Furthermore, Kelly maintained more than a marginal proprietary interest in the packages of books and magazines. *See United States v. Hunt, supra,* 505 F.2d at 938; *Collins v. Wolff,* 337 F. Supp. 114, 117 (D. Neb.), *aff'd per curiam,* 467 F.2d 359 (8th Cir. 1972). The packages were consigned to Century News, in other words Thomas Kelly; many of the books and magazines were ultimately delivered to Kelly; and Kelly wrote Sovereign News and obtained credit for shortages.

These same facts support the conclusion that appellant was entitled to a reasonable expectation of privacy in the packages of books and magazines. *See Jones v. United States, supra,* 362 U.S. at 260-67; *United States v. Burke,* 506 F.2d 1165, 1170-71 (9th Cir. 1974), *cert. denied,* 95 S. Ct. 1576 (1975). The government contends that appellant had no legitimate expectation of privacy since the packages were mailed C.O.D. to Century News and because a common carrier has a right to inspect packages. The government emphasizes that Kelly did not come into possession and had no right to possession until he had paid for the shipments. The contentions of the government, however, are too firmly tied to concepts of traditional property law, and a defendant's expectation of privacy should not be deemed

unreasonable merely because he had not yet paid postage nor because of a right of the UPS to inspect packages. *See Mancusi v. DeForte,* 392 U.S. 364, 368-70 (1968); *Jones v. United States,* 362 U.S. 257, 260-67 (1960).

The denial of standing to appellant would subject Kelly to contradictory assertions of power by the government. *Jones v. United States, supra,* 362 U.S. at 263, created the doctrine of "automatic standing" which is applicable to cases where possession of the seized evidence is itself an essential element of the offense with which the defendant is charged. In such cases the government is precluded from denying that the defendant has the requisite interest to challenge admission of the evidence. In the instant case, Kelly has not been charged with a crime in which possession of seized evidence is an essential element. *See* 18 U.S.C. § 1462 (1970). Kelly has been subjected, however, to a similar form of contradictory assertion of governmental power as that involved in *Jones.* Appellant has been convicted of the knowing *use* of an interstate carrier for the transportation of obscene materials. The government has attempted to show that Kelly exercised dominion and control over interstate shipments of purportedly obscene books at the time of their seizure and simultaneously has contended that Kelly does not have a sufficient interest to challenge the search or seizure of the same materials. Proper administration of criminal justice should not include such contradictory assertions of governmental power. *See Brown v. United States, supra,* 411 U.S. at 228-29; *Jones v. United States, supra,* 362 U.S. at 263. For all of the preceding reasons, we conclude that appellant Thomas C. Kelly has the requisite standing to contest the alleged seizure of the books and magazines in question.

II

The remaining question is whether the alleged seizure of the books and magazines was unreasonable within the meaning of the Fourth Amendment. The government asserts and appellant

concedes that there was no governmental *search* since the initial discovery of the packaged materials was the result of a routine damage inspection conducted by United Parcel Service employee Gerald Spitznagel.

Individual conduct devoid of governmental involvement is beyond the scope of the exclusionary rule. *Burdeau v. McDowell*, 256 U.S. 465, 475-76 (1921); *see Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). For example, searches conducted by air carriers generally are not subject to Fourth Amendment protection. *See United States v. Pryba*, 502 F.2d 391 (D.C. Cir. 1974), *cert. denied*, 95 S.Ct. 815 (1975); *United States v. Echols*, 477 F.2d 37, 39 (8th Cir.), *cert. denied*, 414 U.S. 825 (1973); *United States v. Burton*, 475 F.2d 469, 471 (8th Cir.), *cert. denied*, 414 U.S. 835 (1973). The initial search of the packages conducted by Mr. Spitznagel is beyond the scope of the exclusionary rule since it has not been established that the UPS search was instigated or assisted by law enforcement officers. *Cf. Corngold v. United States*, 367 F.2d 1, 4-6 (9th Cir. 1966). Governmental involvement in the instant case, therefore, is limited to the activity of the FBI after first being called by Spitznagel. It must be determined whether the *seizure* of books and magazines by FBI Agent William McDermott constituted governmental conduct so unreasonable as to necessitate the operation of the exclusionary rule.

Warrantless searches or seizures are per se unreasonable unless there are special circumstances which excuse compliance with the Fourth Amendment warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). Agent McDermott testified that an attempt was made at one time to obtain a warrant from the court clerk, but he declined to issue the warrant because he was only an acting magistrate. Since the government concedes that the seizure was conducted without a warrant, the FBI seizure of the books and magazines in the instant case must be considered unreasonable if it does not

come within "a few specifically established and well-delineated exceptions" to the Fourth Amendment. *Id.* The burden is on the government to show the applicability of a legitimate exception to the warrant requirement. *Vale v. Louisiana*, 399 U.S. 30, 34 (1970).

Our review of the record compels the conclusion that the government has failed to sustain its burden of establishing a traditional exception to the warrant requirement. The facts do not show a search conducted incident to a valid arrest. *Cf. Chimel v. California*, 395 U.S. 752, 762-63 (1969). Although the FBI seizure of the books and magazines was made with the consent of the UPS, it is clear that such consent does not satisfy the requirements of the Fourth Amendment. *See Stoner v. California*, 376 U.S. 483, 488-90 (1964). Moreover, the consignment of materials to a common carrier does not constitute an abandonment of appellant's interest in the contents of the packages. *See Corngold v. United States*, 367 F.2d 1, 6-7 (9th Cir. 1966). The record also fails to reveal exigent circumstances, such as the potential destruction of evidence. The materials were entirely within the control of the UPS, and there is no indication that Kelly intended to destroy the materials in question. In fact, it does not appear that Kelly was even aware of the FBI investigation since he continually sought credit from Sovereign News for the missing materials that were seized. *See Johnson v. United States*, 333 U.S. 10, 14-15 (1943).

To justify the warrantless seizure of the books and magazines, the government principally relies on the "plain view" exception to the general Fourth Amendment warrant requirement. *See, e.g., Harris v. United States*, 390 U.S. 234, 236 (1968). The government emphasizes that UPS employee Spitznagel discovered the materials during a damage inspection and that FBI Agent McDermott merely seized books and magazines which were in plain view, sitting on Spitznagel's desk at the United Parcel Service. It is contended that the materials constituted

openly visible contraband or evidence of a crime which could be seized without a warrant.

It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. *Harris v. United States, supra,* 390 U.S. at 236. Because of the *nature* of the property seized in the instant case, however, the seizure cannot be justified on the basis of the plain view exception.[4] "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." *Roaden v. Kentucky,* 413 U.S. 496, 501-03 (1973). The Fourth Amendment should be read in conjunction with the First Amendment, rather than "in a vacuum." *Id.* The proper seizure of books and magazines, which are presumptively protected by the First Amendment, demands a greater adherence to the Fourth Amendment warrant requirement. *Roaden v. Kentucky, supra,* 413 U.S. at 504; *A Quantity of Books v. Kansas,* 378 U.S. 205, 212 (1964); *Wilhelm v. Turner,* 298 F. Supp. 1335, 1337 (S.D. Ia. 1969); *aff'd,* 431 F.2d 177, 180 (8th Cir. 1970); *cert. denied,* 401 U.S. 947 (1971). As the Supreme Court stated in *Roaden v. Kentucky, supra*:

> The seizure of instruments of a crime, such as a pistol or a knife, or "contraband or stolen goods or objects dangerous in themselves," are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards.

413 U.S. at 502 (citations omitted). Consequently, in the absence of exigent circumstances in which police must act immediately to preserve evidence of the crime, we deem the warrantless seizure of materials protected by the First Amendment to be unreasonable. *See Marcus v. Search Warrant,* 367 U.S. 717, 729-38 (1961).

[4] Parenthetically, we observe that the circumstances of the seizure do not seem to satisfy the inadvertence requirement of the typical plain view situation. *See Coolidge v. New Hampshire,* 403 U.S. 443, 469 (1971). In the instant case, FBI Agent McDermott was telephoned by Mr. Spitznagel and requested to come to the UPS office in order to examine the books and magazines already discovered.

Such a seizure without a warrant is unreasonable not because it would be easier to obtain a warrant but because prior restraint of the right to expression demands a more strict evaluation of reasonableness. *See Roaden v. Kentucky, supra,* 413 U.S. at 504. For example, in *Marcus v. Search Warrant,* 367 U.S. 717, 732 (1961), and *Lee Art Theatre v. Virginia,* 392 U.S. 636, 637 (1968), the Supreme Court held that a warrant for the seizure of allegedly obscene material could not be issued on the mere conclusionary opinion of a police officer that the material sought to be seized was obscene. In the absence of exigent circumstances, therefore, seizure of First Amendment materials should observe traditional constitutional safeguards and allow a judge to focus searchingly on the question of obscenity.

The government contends that the seizure of the books by FBI Agent McDermott was reasonable, even without a warrant, since only sample copies of the materials were taken from the shipments. We find this distinction untenable, however, and inconsistent with the thrust of recent Supreme Court decisions. *See Roaden v. Kentucky,* 413 U.S. 496, 501-06 (1973). A contrary conclusion would reduce First Amendment materials such as books and magazines to lesser rather than greater adherence to the warrant requirement of the Fourth Amendment. *See Roaden v. Kentucky, supra,* 413 U.S. at 504.

We conclude that the governmental seizure[5] of the books and

[5] The books and magazines enumerated in Count VI of Kelly's indictment were not confiscated at the UPS office. These particular materials were examined by the FBI, marked, replaced in packages and later purchased from Century News by FBI agents. Given the knowledge obtained by the government from the five previous examinations and seizures of appellant's materials at UPS and the

magazines in the instant case was unreasonable under the Fourth Amendment since the seizure was conducted without first obtaining a warrant.[6] As the Supreme Court stated in *Roaden v. Kentucky, supra,* 413 U.S. at 506:

> If, as *Marcus* and *Lee Art Theatre* held, a warrant for seizing allegedly obscene material may not issue on the mere conclusionary allegations of an officer, *a fortiori,* the officer may not make such a seizure with no warrant at all.

It is clear that exigent circumstances may make it reasonable to permit police action without prior judicial evaluation. *Roaden v. Kentucky, supra,* 413 U.S. at 505. We, however, are not aware of the existence of any exigent circumstances in the instant case. The FBI had ample opportunity to obtain a valid warrant based on the affidavit of Mr. Spitznagel or Agent McDermott prior to the scizure of any books or magazines. This is not a case involving contraband or objects dangerous in themselves.

The judgment of the district court is reversed, and this case is remanded for further proceedings not inconsistent with this opinion. Our remand of the case on the basis of the search and seizure issue renders unnecessary any consideration of appellant's additional contention that the evidence did not show Kelly's knowing use of a common carrier and his scienter or

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physical examination and marking of the books and magazines themselves, we also regard the governmental interference with these particular materials as an unreasonable search or seizure.

[6] The government alleges that various Supreme Court decisions involving search or seizure of First Amendment materials are distinguishable from the instant case since many dealt with massive seizures in a commercial setting. *See, e.g., A Quantity of Books v. Kansas,* 378 U.S. 205, 206-15 (1964). Accordingly, the government contends that a prior adversary hearing for a judicial determination of obscenity was not required. We, however, need not consider whether a prior hearing was required since the FBI did not even obtain a warrant in the instant case.

knowledge of the shipments within the meaning of 18 U.S.C. § 1462 (1970).

Reversed and remanded.

A true copy.

Attest

CLERK, U.S. COURT 0F APPEALS
EIGHTH CIRCUIT

APPENDIX C

Stipulation No. 1

It is hereby stipulated by the parties in the above-entitled case;

That Sue Cox would testify that she is employed at Emery Air Freight and has been so employed for approximately seven years. That on May 8, 1974, between 2:00 and 2:30 P.M., Harold Peter Entringer, whom she knows as Peter Entringer, presented himself at the Emery Air Freight Office and inquired as to whether his shipment was in from Philadelphia. Cox advised Mr. Entringer that his shipment had been pilfered and was being held by the Federal Bureau of Investigation. Entringer then said he would have to call Philadelphia and left the Emery Air Freight Service in a hurried manner. Miss Cox would further testify that she has seen Entringer on several occasions, as he was for a period of at least two years prior to May 8, 1974, a frequent customer of Emery Air Freight. Entringer on numerous occasions has received packages from Emery Air Freight, broken down packages, and attempted to re-ship them to Guam without providing Emery Air Freight with an invoice. After a long discussion with Entringer, who refused to provide such an invoice, federal authorities were contacted and Entringer was allowed to ship the packages to Guam with the declaration that the packages contained film.

No. 75-1571

In the Supreme Court of the United States

OCTOBER TERM, 1976

HAROLD PETER ENTRINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 532 F. 2d 634.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1976. A timely petition for rehearing was denied on April 1, 1976. The petition for a writ of certiorari was filed on April 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the taking of an inventory, in the presence of an agent of the FBI, of a damaged shipment of air freight by employees of a commercial airline constituted a search in violation of petitioner's rights under the Fourth Amendment.

2. Whether the FBI agent's acquisition, from employees of a commercial airline, of obscene material discovered during an inventory of a damaged shipment of air freight constituted a seizure under the Fourth Amendment.

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of having used a common carrier to transport obscene material interstate, in violation of 18 U.S.C. 1462. He was sentenced to ninety days' imprisonment, to be followed by two years' and nine months' probation. The court of appeals affirmed (Pet. App. A).

The evidence at trial, as described by the court of appeals (Pet. App. A-2 to A-3), showed that on May 8, 1974, a two-package shipment of air freight addressed to petitioner arrived in St. Louis, Missouri, at the Lambert Field office of Trans World Airlines. The larger of the two packages had been torn open and some of its contents appeared to have been pilfered. James Eberhardt, a TWA cargo manager, notified FBI Agent Leon Cantin of a possible theft from an interstate shipment and that company policy required that an inventory be made of the shipment to determine the extent of any loss (Stp. 4).[1] Because Cantin was involved that day in another investigation, he requested that Eberhardt delay the inventory until the following morning.

Had the packages addressed to petitioner arrived at the Lambert Field office in an undamaged condition, employees of TWA would have forwarded them to the

[1] "Stp." refers to the factual stipulations between petitioner and the government.

local Emery Air Freight office for delivery to petitioner. An employee of TWA notified Emery on May 8 that the packages had been damaged, and that TWA was retaining them for inventory. When petitioner went to the Emery Air Freight office on May 8 to pick up the packages, an Emery employee informed him that the packages had been damaged, and apparently pilfered, and that they were being held pending an investigation by the FBI. Petitioner never returned to claim the packages.

On the morning of May 9, 1974, Agent Cantin arrived at TWA's Lambert Field office and found that TWA employees already had cut open the damaged package. In Cantin's presence, Eberhardt and two other TWA employees—Jack Dvorak and Jim Stinson,[2] who were acting at Eberhardt's direction—inventoried the contents of the package. They also opened and inventoried the smaller package in order to locate the packing slip for the shipment and complete their assessment of loss. Cantin did not urge the airline employees to open either package and, as petitioner concedes (Pet. 8), the agent did not participate in the inventory.

The invoice recovered from the smaller package indicated that the shipment contained 124 "leather novelties." In fact, however, the packages contained 114 reels of 8 mm films in containers marked "not to be sold to minors." Advertising brochures were packed with the films, graphically illustrating the films' contents.[3]

[2] The references in the petition to Stinson as "Agent Stinson" (Pet. 9, 13, 14) are incorrect (Stp. 3; Tr. 7-8).

[3] Petitioner did not contend in the court of appeals (see Pet. App. A-3), and does not contend here, that the films and brochures were not obscene.

After viewing this material, Agent Cantin, acting without a warrant, took it from the premises to the FBI office. Petitioner was indicted subsequently on the basis of two of the films discovered during the inventory.[4]

ARGUMENT

1. Petitioner contends (Pet. 12-13) that the inventory taken by employees of TWA constituted a search in violation of his rights under the Fourth Amendment. This contention is without merit.

The Fourth Amendment protects against unreasonable intrusions by the government but does not limit private conduct. *E.g., Burdeau* v. *McDowell*, 256 U.S. 465, 475; *United States* v. *Pryba*, 502 F. 2d 391, 397-398 (C.A. D.C.), certiorari denied, 419 U.S. 1127. In the present case, the decision to inventory the contents of the packages addressed to petitioner was made by employees of TWA. Although an agent of the FBI was present during the inventory, the agent did not ask for or participate in the inventory. Neither was the inventory taken for law enforcement purposes, so as to raise doubts concerning whether the inventory was truly private in nature; rather, the evidence showed that the inventory was undertaken by TWA employees, pursuant to company policy, to determine the extent of any loss from or damage to the packages (see Pet. App. A-2). As the court noted in *United States* v. *Pryba*, *supra*, 502 F. 2d at 398 (footnotes omitted):

> [W]here the search is made on the carrier's own initiative for its own purposes, Fourth Amendment protections do not obtain for the reason that only the activities of individuals or nongovernmental entities are involved. So frequently and so emphatically have the courts enunciated and applied these principles that, at least for the time being, they must be regarded as settled law.[5]

[4] A third film introduced at trial was seized in April 1975 pursuant to a search warrant that was issued in part on the basis of the materials discovered during the inventory taken by TWA employees on May 9, 1974 (see Pet. App. A-3).

2. Petitioner also contends (Pet. 14-15) that Agent Cantin's acquisition of the packages and their contents from TWA employees amounted to an unlawful seizure under the Fourth Amendment.

Not every acquisition by the government of physical evidence constitutes a seizure subject to the proscriptions of the Fourth Amendment. In *Coolidge* v. *New Hampshire*, 403 U.S. 443, for example, this Court held that acquisition by the police of guns and clothing, later introduced at trial, from the defendant's wife did not implicate the Fourth Amendment because such items had been given to the police voluntarily. Similarly, the Court of Appeals for the Ninth Circuit, sitting *en banc*, recently held on facts similar to those present here (*United States* v. *Sherwin*, No. 73-3124, decided July 2, 1976, slip. op. 7-8 (citation and footnote omitted)):

[5] Petitioner attempts to distinguish *United States* v. *Pryba*, *supra*, and *United States* v. *Echols*, 477 F. 2d 37 (C.A. 8), certiorari denied, 414 U.S. 825, by suggesting that in both cases employees of the carriers involved acted to protect either persons or property "from the possibility that some harmful object [might have been] contained in the objects searched" (Pet. 13). But in neither case did the court so limit its decision (indeed, in *Pryba*, airline employees opened packages destined for the defendant because they suspected that the packages, ultimately found to contain obscene films, contained narcotics). Petitioner has not referred to any case holding that an otherwise private inventory loses its private character if undertaken to determine the extent and nature of any loss that might have been sustained.

A consensual transfer is by definition not a seizure. * * * The private person's legal authority to approve a transfer of objects found in a private search has no bearing on whether his relinquishment of those objects to the government is coerced or voluntary. In *Coolidge* [v. *New Hampshire, supra*], for example, there was no indication the wife had any authority over the objects turned over, nor were the police required to determine the scope of her authority. If a transfer is voluntary, then it is not a seizure and the fourth amendment's reasonableness standard is simply inapplicable.[6]

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[6]Two judges dissented from this holding on the basis of the Eighth Circuit's contrary holding in *United States* v. *Kelly*, 529 F. 2d 1365 (slip op. 10). But in *Kelly*, also relied upon by petitioner (Pet. 12, 14-15; Pet. App. B), the panel simply stated in relevant part without analysis that "[a]lthough the FBI seizure of the books and magazines was made with the consent of the [United Parcel Service, the common carrier involved], it is clear that such consent does not satisfy the requirements of the Fourth Amendment" (529 F. 2d at 1371). In support of that conclusion, the panel referred to *Stoner* v. *California*, 376 U.S. 483. The issue in *Stoner*, however, was whether the search of the defendant's hotel room by police officers was subject to the Fourth Amendment despite the fact that consent to search had been given by a hotel night clerk. Unlike the situation in *Stoner*, the Fourth Amendment is not applicable to the initial intrusion that occurred in the present case because that intrusion was private, rather than governmental, in nature.

While there is a conflict between the holdings in *Sherwin* and *Kelly*, the holding in the present case conflicts with neither (see discussion *infra*, pp. 7-8); consequently, the petition in this case does not present an occasion to resolve an inter-circuit conflict. It is at least possible, moreover, that the panel that decided *Kelly* would reconsider its summary conclusion concerning the impact of the Fourth Amendment on consensual transfers, if presented with a case involving that issue, in light of the extended analysis of the issue by the full court in *Sherwin*.

Even if it is assumed, however, that Agent Cantin's acquisition of the packages and their contents from TWA employees amounted to a seizure, that "seizure" was lawful under the Fourth Amendment. In *Roaden* v. *Kentucky*, 413 U.S. 496, the film in question was seized by a sheriff, incidental to the warrantless arrest of the theater manager, after the sheriff had viewed the film in the theater. This Court directed that the film be suppressed because the seizure, when considered in terms of the First Amendment, was unreasonable under the Fourth Amendment. In explaining its holding, this Court stated (413 U.S. at 503-504; footnote omitted):

> The common thread of *Marcus* [v. *Search Warrant*, 367 U.S. 717], *A Quantity of Books* [v. *Kansas*, 378 U.S. 205] and *Lee Art Theatre* [v. *Virginia*, 392 U.S. 636] is to be found in the nature of the materials seized and the setting in which they were taken. * * * In each case the material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore of the commercial theater, each presumptively under the protection of

> the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression.

The present case stands on an entirely different footing. There was no seizure here of a "film then being exhibited to the general public." Neither was there a showing that the material addressed to petitioner was on the "threshold of dissemination." See *Mishkin* v. *New York*, 383 U.S. 502, 513; *Heller* v. *New York*, 413 U.S. 483, 492 n. 8. Nor is it possible to assert that the FBI's acquisition of the material was tantamount to the seizure "of all the books in a bookstore" (*Roaden, supra*, 413 U.S. at 504). At most, the FBI here acquired material that had been subjected to a private inventory. There was nothing to show what petitioner intended to do with the material had it been given to him. Indeed, petitioner came only once for the packages and, upon being told that they were being inventoried, he never returned. Cf. *Abel* v. *United States*, 362 U.S. 217, 238.

Had the material been forwarded by TWA to Emery Air Freight for delivery to petitioner, moreover, there was—as the court of appeals noted (Pet. App. A-5)—"a genuine danger * * * that the evidence would be destroyed." Viewed in this setting, we submit that the "seizure" that occurred here was reasonable and did not violate petitioner's rights under the Fourth Amendment. Compare *United States* v. *Cangiano*, 491 F. 2d 906, 913 (C.A. 2), certiorari denied, 419 U.S. 904.[7]

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[7] When material is seized in violation of the First Amendment rather than the Fourth Amendment, the appropriate remedy is not, in any event, to suppress it as evidence at trial but to order its return. See *Heller* v. *New York*, *supra*, 413 U.S. at 493 n. 11; *United States* v. *Sherwin*, *supra*, slip op. 9 n. 11. This difference in remedy reflects the fact that "the principal object of the Fourth Amendment is the protection of privacy rather than property * * *" (*Warden* v. *Hayden*, 387 U.S. 294, 304).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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